

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
AT NASHVILLE, TENNESSEE

CONSUMER ADVOCATE DIVISION

vs.

BELLSOUTH TELECOMMUNICATIONS,  
INC.

) '99 OCT 7 PM 3 50  
) Docket No. \_\_\_\_\_  
) EXECUTIVE SECRETARY  
)  
) Tariff 99-00574  
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RESPONSE TO MOTION TO DENY AND DISMISS

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Complainant and Petitioner, Consumer Advocate Division of the Office of the Attorney General respectfully requests the Tennessee Regulatory Authority to deny BellSouth's motion.

BellSouth is an incumbent local exchange company. "Incumbent local exchange telephone company" means a public utility offering and providing basic local exchange telephone service as defined by § 65-5-208 pursuant to tariffs approved by the commission prior to June 6, 1995. Tenn. Code Ann. § 65-4-101 (d). Incumbent local exchange companies ("ILEC") must be regulated in a manner different from competitive local exchange companies.<sup>1</sup> This is particularly true when the ILEC elects to bring itself within particular types of regulation. In this instance, BellSouth elected to apply for price regulation. Tenn. Code Ann. § 65-5-208 provides:

Classification of services - Exempt services - Price floor - Maximum rates for non-basic services.

(a) Services of incumbent local exchange telephone companies who apply for price regulation under § 65-5-209 are classified as follows:

(1) "Basic local exchange telephone services" are telecommunications services which are comprised of an access line, dial tone, touch-tone and **usage** provided

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<sup>1</sup>The Consumer Advocate Division respectfully submits that the allegation that "several CLEC's have late payment tariffs is of no relevance and should not be considered. The CLEC's have not applied for price regulation.

to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, **Lifeline, Link-Up Tennessee**, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on June 6, 1995. **Rates** for these services **shall include** both recurring and nonrecurring **charges**.

On December 9, 1998, the Tennessee Regulatory Authority entered an order approving BellSouth's application. The order provided that BellSouth's price regulation plan would begin on December 1, 1998. BellSouth has not appealed that order.

If BellSouth became subject to price regulation on December 1, 1998, Tenn. Code Ann. § 65-5-209 (f) applies. Subsection (f) provides that BellSouth shall not increase items included in Tenn. Code Ann. § 65-5-208 (a) (1) for four (4) years after the company becomes subject to price regulation.

In addition, BellSouth bills and collects for non BellSouth services. See generally, preamble to E8. Billing and Collection Services tariff. BellSouth incurs no financial risk from this billing and collection because the tariff provides for recourse against the clearinghouse. BellSouth tariff, E.8.2.3A.b. Moreover, the late payment charge, in such instances will not arise for services provided by BellSouth.

#### STANDARD OF REVIEW

The Tennessee Supreme Court has set a standard for review of motions to dismiss. The standard is that a:

*motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof. Such a motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. In considering a motion to dismiss, courts should construe the complaint*

*liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. Cook v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934, 938 (Tenn. 1994). In considering this appeal from the trial court's grant of the defendant's motion to dismiss, we take all allegations of fact in the plaintiff's complaint as true...Tenn. R. App. P. 13(d); Owens v. Truckstops of America, 915 S.W.2d 420, 424 (Tenn. 1996); Cook, supra.*

Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997).

The Consumer Advocate Division's material allegations facts, include but are not limited to, the allegation that BellSouth's basic local exchange rates on June 6, 1995 encompassed late payment charges. The Consumer Advocate Division's material allegations are also that if BellSouth's additional late charge will constitute a double payment on basic local exchange service because the late payment charge is already encompassed in consumers rates. The Consumer Advocate Division alleges that charges, including late payment charges for basic local exchange services were included in basic local exchange service rates on June 6, 1995. The Consumer Advocate Division alleges that basic local exchange services as defined by Tenn. Code Ann. § 65-5-208 encompass charges, including charges for late payments. The Consumer Advocate Division alleges that other consumers are similarly situated with state government agencies. The Consumer Advocate Division alleges that the tariff creates unjust preferences and unjust discrimination. The Consumer Advocate Division further alleges that utilizing regulation to permit BellSouth to charge a late payment fee for things and services consumers did not order from BellSouth fails to protect consumers as required by Tenn. Code Ann. § 65-4-123. The Consumer Advocate Division also alleges that the additional late charges proposed are unreasonable and in fact, extortionate because late charges are already incorporated in the rates.

Moreover, BellSouth does not propose to reduce other rates to offset the rate increase.

(BellSouth motion at p. 7) BellSouth would be required to offset in order to stay within the aggregate rate requirements of Tenn. Code Ann. § 65-5-209.

The Consumer Advocate Division alleges that the Tennessee Regulatory Authority, the entity in charge of implementing regulation, has a duty to protect the interests of consumers pursuant to Tenn. Code Ann. § 65-4-123. There is no question that such a statutory duty exists. In conjunction with that duty the Consumer Advocate Division argues that when the authority is presented with a statute susceptible to two (2) interpretations and one interpretation would protect the interests of consumers while the other interpretation would not protect the interests of consumers, the Tennessee Regulatory Authority has a duty to select the interpretation which fulfills the legislative intent of protecting consumers. BellSouth does not contest the Consumer Advocate Division's position that the legislative intent is that regulation should protect the interests of consumers.

BellSouth does not deny that late charges are encompassed in current rates. Its first argument is, that CLEC's bill for late payments. (BellSouth motion at p. 2,5). Its second argument is that existing rates are not relevant, whether or not they encompass late payments. (BellSouth motion at p. 3-6). Its third argument is that the proposed late payment charge is not a rate for any telecommunications service<sup>2</sup> and that the company incurs "additional [but, undisclosed] costs." (BellSouth motion at p. 6-7). Its fourth argument is that exempting state agencies from the late payment tariff is not discriminatory.<sup>3</sup> Its final argument is that the TRA should deny the Consumer Advocate Division's request for injunctive relief because the

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<sup>2</sup>If the rate is not a rate for telecommunications service, what is being tariffed?

<sup>3</sup>However, BellSouth fails to enunciate the factors which show non discrimination.

Consumer Advocate Division has failed to prove that it is entitled to injunctive relief.<sup>4</sup>

As stated earlier, BellSouth can not prevail in a motion to dismiss by arguing facts. It can only prevail if it proceeds as if all the Consumer Advocate Division's allegations are in fact true, but there are still no legal grounds for relief. As a result, only the company's third argument-- that late charges are not cover under price regulation-- have even a scintilla of meeting the legal standard. BellSouth's motion to dismiss must fail, however, even on that ground. The Consumer Advocate Division alleges that late charges are charges covered under price regulation and Tenn. Code Ann. § 65-5-208 (a)(1) unequivocally speaks to covering "charges."

A motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of the Consumer Advocate Division's. BellSouth inappropriately directs itself to attempting to test the strength of proof, but does not prove as a matter of law that charges, or late charges are not covered under price regulation and concedes the discrimination issue, and other issues, therefore its motion to dismiss should be denied.

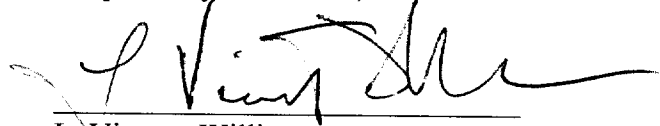
Wherefore, the Consumer Advocate Division prays that the Tennessee Regulatory Authority deny or overrule BellSouth's motion to dismiss, require the company to answer and to

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<sup>4</sup>BellSouth misapprehends the standard of review for a motion to dismiss. The standard of review presumes a finding of all facts in favor of the Consumer Advocate Division. As a result, injunctive relief is necessarily presumed unless no relief is warranted because of some other factor.

grant other relief as is just.

Respectfully Submitted,



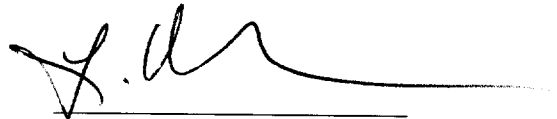
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Document has been mailed postage prepaid to the parties listed below this 7<sup>th</sup> day of October, 1999.

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